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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

BIO-RECOVERY, INC.,

Petitioner,

v.

JOHN R. TUNHEIM, Judge,

Respondent.

Petition for Writ of Prohibition to the United States District Court for the District of Minnesota, Fourth Division

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PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Whether a court, *sua sponte* **and where one party has defaulted**, can properly dismiss the **entire** complaint of a **non-defaulting** party simply, Petitioner contends, in order to create an excuse for giving a willfully defaulting party an undeserved second chance to plead or otherwise defend.

2. Whether a court exceeds its jurisdiction or abuses its discretion when it ignores and excuses the illegality of the filing of an Answer **after** default had been entered and completely disregards (a) the law applicable to the filing of an Answer **by a party against whom default has already been duly entered** and (b) the legally imposed waivers and jurisdictional finalities imposed by Fed. R. Civ. P. 12 on a party who fails to plead or otherwise defend within the time allowed.

3. Whether a court exceeds its jurisdiction or abuses its discretion when it sets aside the default of a party who willfully defaulted and has no meritorious defenses and where the so-called "meritorious" defenses are clearly based on perjured, implausible testimony.

4. Whether a court exceeds its jurisdiction or abuses its discretion where, by any standard **and where the other party has defaulted and never moved for a more definite statement**, the court requires the non-defaulting party, ***sua sponte***, to re-write, re-serve, and re-file its **entire** complaint under threat of outright dismissal.

5. Whether a court exceeds its jurisdiction or abuses its discretion when it completely ignores the objective bright line jurisdictional requirements of Fed. R. Civ. P. 12 while dismissing a party's **entire** complaint on the grounds that it violates the subjective requirements of Fed. R. Civ. P. 8 and 9(b).

6. Whether a court exceeds its jurisdiction or abuses its discretion when it fails to impose the least severe sanction necessary to accomplish what the court believes should be done.

7. Where a motion for relief from default is granted, whether a court abuses its discretion when it declines to award the non-defaulting party its costs and attorney's fees for having to oppose the motion for relief from default and for having to move to strike the filing of an unauthorized and thus void Answer.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. _____

BIO-RECOVERY, INC., *Petitioner*

v.

JOHN R. TUNHEIM, Judge, *Respondent*

PETITION FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION, AND THE HONORABLE JOHN R. TUNHEIM, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

The petition, on the relation of petitioner Bio-Recovery, Inc., for a writ of prohibition, shows:

I.

Petitioner Bio-Recovery, Inc., is the plaintiff in a certain action titled Bio-Recovery, Inc. v. The JB Group and James Schoonover and Brian McManus, individually and as officers of the JB Group Inc., being Case No. 4-95-Civ-554 in United States District Court, District of Minnesota, Fourth Division, and presided over by The Honorable John Tunheim, a duly qualified judge of that court. Defendant JB Group is an Illinois corporation. Defendants Schoonover and McManus are residents of Illinois and officers of Defendant JB Group. Bio-Recovery

is a Minnesota corporation.

II.

The underlying matter giving rise to this petition is a contract action brought by Bio-Recovery, Inc., against the defendants to recover damages for, *inter alia*, breach of contract, fraudulent misrepresentation, breach of promise, loss of sales and profits, fraudulent inducement, and conversion.

III.

This petition seeks an extraordinary writ vacating and expunging Judge Tunheim's Order (of February 20, 1996) Adopting Report and Recommendation of the Magistrate Judge (John Mason). (App. at 4-8). That Order, *inter alia*, **dismisses** Plaintiff's Amended Complaint without prejudice while gratuitously assuring that Defendants will not be adversely affected by their failure to plead or otherwise defend within the time allowed. Judge Tunheim describes Defendants' motion to set aside the default as the "principal issue" here. (App. at 5). That is incorrect and belies a serious, if not curious, misunderstanding of the issues. The principal "issues" here are (1) whether a court, *sua sponte* **and where one party has defaulted**, can properly dismiss the **entire** complaint of a **non-defaulting** party simply, Petitioner contends, in order to create an excuse for giving a willfully defaulting party an undeserved second chance to plead or otherwise defend, (2) whether a court may simply ignore and thus excuse the undeniable illegality of the filing of an Answer **after** default had been entered, and (3) whether a court may simply ignore the waivers imposed by Fed. R. Civ. P. 12 on a failure to plead or otherwise defend within the time allowed.

IV.

On March 5, 1996, the Court of Appeals for the

Eighth Circuit, without opinion, denied Petitioner's application for leave to file a petition for a writ of prohibition as well as Petitioner's motion for a stay of the entry of Judge Tunheim's Order of February 20, 1996. (App. at 9).

V.

Plaintiff personally served a copy of its original Complaint on each of the defendants on August 30, 1995. A copy of Plaintiff's Amended Complaint was filed on September 15, 1995, after being served on Defendant Schoonover on September 13th, and on Defendants McManus and JB Group, on September 14th. That Amended Complaint was accompanied by a cover letter from attorney Brian O'Kane which specifically told Defendants that "your time to serve an answer in the within action is extended by 10 days from the service of this pleading."

VI.

On September 21, 1995, through attorney O'Kane, Plaintiff moved for a TRO which was scheduled to be heard by The Honorable David Doty on September 25th. At the time, *pro hac vice* attorney O'Kane's sponsor was Corey Ayling[1]. Attorney O'Kane appeared for the hearing only to learn that it had been cancelled following a phone call from Defendants' attorney Marc Smith, who told the court that he and attorney Ayling had reached an "agreement' which made the TRO hearing unnecessary. An astonished O'Kane overruled the preposterous "agreement" upon reviewing it and immediately faxed a take-it-or-leave-it Stipulation to attorney Smith on that same day. On Defendants' behalf, attorney Smith

[1] On September 28, 1995, attorney Alfred Stanbury replaced attorney Ayling as *pro hac vice* attorney O'Kane's sponsor and has been Plaintiff's lead counsel in this case ever since. Signing off on the Stipulation written by attorney O'Kane constituted attorney Ayling's **only** involvement in this case.

immediately signed off on it. **Because no stipulation "negotiations" ever occurred, Judge Tunheim has no reason whatsoever to believe Defendants' pretextual concoction that their engagement in or preoccupation with such "negotiations" caused them to "simply forget" to answer or otherwise plead within the time allowed.**[2] *See* App. at 6 ("Rather, they simply overlooked the deadline for filing an Answer.").

VII.

None of the Defendants served and/or filed an Answer and/or interposed any Rule 12 motion within the time allowed--*i.e.*, by September 26, 1995, as to Defendant Schoonover and by September 27, 1995, as to Defendants McManus and JB Group.

VIII.

On September 28, 1996, after realizing that Defendants were not going to voluntarily relinquish a crucial "800" number (1-800-24-SOBER), an issue not covered in the Stipulation, Plaintiff scheduled a hearing for the next day before Judge Doty in order to once and for all deal with its motion for a TRO and preliminary injunction. In the afternoon of September 28th, Defendants attorney Smith told Judge Doty's law clerk by phone that Defendants would **not** be submitting any responsive papers and that he was **not** going to travel from Chicago to the hearing in Minneapolis on September 29th. Defendants did not submit any responsive papers, but Defendants'

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2 In Federal Trade Commission v. Packers Brand Meats, 562 F.2d 9 (8th Cir. 1977), the trial court's entry of a default judgment was upheld. The Eighth Circuit Court of Appeals held that none of the defendant's excuses for its default were substantial, one of which was that the defendant's attorney had not had time to prepare a response (to the FTC's petition for an order enforcing a subpoena *duces tecum*) because he had been preparing for an appearance of the defendant's president before a Federal Grand Jury. *Id.* at 10 n.2.

attorney Smith did show up at the hearing along with Defendants' local attorney Stephen Warch. The attendance of Defendants' attorney Smith at the hearing on September 29th had nothing to do with Defendants' failure to plead or otherwise defend on time. Their deadlines to plead or otherwise defend had passed on September 26th and 27th. A **never-disputed** documentation of the misconduct of Defendants' counsel at the hearing is attached to this petition in the form of a letter dated September 29, 1995, from attorney Stanbury to Judge Doty. (App. at 1-3).

IX.

On October 2, 1995, Plaintiff obtained an entry of a default as to Defendants by the Clerk of Court pursuant to Fed. R. Civ. P. 55(a). On October 3, 1995, Plaintiff applied to the court for entry of a default judgment and trial to a jury on the sole issue of damages, for hearing by Judge Doty on November 17th.

X.

On October 3, 1995, Judge Doty issued an Order approving the Stipulation **and** requiring Defendants to turn over the 800 number to Plaintiff immediately, saying in pertinent part:

> The court finds the position of the defendants to be unacceptable. First, the original stipulation was unequivocally reaffirmed by both counsel before this court at the hearing on September 29, 1995. . . . Accordidngly, based on the agreement of defendants, the '800-24-S-O-B-E-R' telephone number shall be immediately transferred from defendants to plaintiff.

XI.

On October 5, 1995, Defendants' attorney Warch asked Plaintiff's attorney Stanbury whether Plaintiff would

withdraw the default and its motion for default judgment if the defendants were to answer, and attorney Stanbury said Plaintiff would not. On or about October 10th, Defendants filed and served their Answer and Affirmative Defenses to Plaintiff's First Amended Complaint and Jury Demand ("Answer"). On October 18th, Defendants served and filed a motion for an order to set aside the entry of default, for hearing by Judge Doty on November 17th. On October 19th, Plaintiff rejected the service of Defendants' void Answer and, on October 20th, Plaintiff served and filed a motion to strike Defendants' Answer **and** a motion for civil contempt for hearing by Magistrate Judge Jonathan Lebedoff on November 3d.

XII.

On October 26, 1995, in a letter to the parties, Magistrate Judge Lebedoff refused to hear Plaintiff's motions to strike Defendants' Answer and for civil contempt on the grounds that they were dispositive motions and thus should be brought before Judge Doty. Judge Doty eventually decided to hear those motions on November 17th, but that hearing was subsequently cancelled due, it was explained, to the reassignment of the case to an "about-to-be-sworn" judge (*i.e.*, to Judge Tunheim, who in fact was not sworn until late December 1995).

XIII.

On November 17, 1995, Plaintiff renewed its motion to strike Defendants' Answer and for sanctions by scheduling them for hearing on December 1st by Magistrate Judge Mason, the magistrate judge to whom the case had been re-assigned. Defendants immediately renewed their motion for relief from default for hearing by Magistrate Judge Mason, and Plaintiff subsequently renewed its motion for entry of a default judgment and for sanctions. All of the foregoing motions were ostensibly

heard by Magistrate Judge Mason on December 1st.

XIV.

At the end of the hearing, Magistrate Judge Mason ruled in pertinent part as follows from the bench:

> Thank you. The court is prepared to rule. . . . The complaint in view of the Court is prolix in the extreme and does not comply with the provisions of Rule 8 or Rule 9(b). . . . I'm going to **grant** the motion to strike the Answer. I'm also going to on my own motion strike the Complaint and recommend to District Court to do so without prejudice in order that a complaint be filed that complies with Rules of Civil Procedure. Among the problems in the Complaint is it's 151 paragraphs long and fourteen counts, if each of those things are counts, thirty-three pages long. It isn't discernible from reading Counts 3 and 4 what it is that those counts allege. It isn't discernible what the difference is between Count 5 and Count 6. It isn't even particularly discernible what contract it is or contracts it is that are alleged to have been (b)reached, what it is that constitutes the breach of those contracts and what the damages are that were alleged from them and obvious things like that.
>
> So this is a procedural mess at this point, and I think the best way to clean it up is to start all over by the issuance of a new complaint to which the Defendants would then respond. . . . (Emphasis added).

XV.

In a letter requesting Magistrate Judge Mason to reconsider his rulings from the bench before issuing the

Report, attorney Stanbury wrote:

> Dear Magistrate Judge Mason:
>
> At the conclusion of the hearing of the above-referenced case on December 1, 1995, I understood Your Honor to have ruled that the defendants' Answer is to be stricken, but the court did not appear to rule directly on any of the other motions properly before the court. Instead, the court, *sua sponte* but without affording any opportunity for my client to be heard on the matter, ruled that my client's duly filed and duly served Amended Complaint shall be stricken, that my client's Amended Complaint shall be changed in some unspecified ways and then re-filed and re-served, and that the defendants will then have a second chance to do what they chose not to do in the first place. The court appears to me to be headed toward the issuance of an order memorializing a mystifying abuse of discretion. Before the court does that, I respectfully submit that the whole matter requires an immediate reconsideration and a re-hearing.
>
> Overall, the court appears to be engaging in an isolated, unsupportable repeal of Rule 12. The waivers of Rule 12, its timelines, and its requirements concerning a motion for a more definite statement are made to appear meaningless. If the court has little or no respect for its own rules and no regard for caselaw, how can it expect a party or its lawyers to have any? The defendants could have brought a motion for a more definite statement pursuant to Rule 12(e) but did not. I put caselaw before the court which convincingly showed that the defendants waived their right to object to my client's Amended Complaint. There was no motion concerning any

aspect of my client's Amended Complaint before the court on December 1st. It was not this court's job to step in and do their lawyering for them. The defendants defaulted. Why does this court believe that it must or even has the right to excuse the defendants' behavior in any way other than relieving them from their default? What have they done to deserve such deference? They have not done anything. They did not plead, they did not move in any way under Rule 12 prior to pleading, they did not move for an extension of time to file their Answer, they did not request leave of court to file their Answer, they ignored Judge Doty's request for a brief on my client's preliminary injunction motion, they purposely lied to the court when before Judge Doty, they have lied and resorted to transparent hearsay in their affidavits submitted to this court, and the legal arguments submitted to this court on the instant motions were neither well-framed nor compelling. Conversely, my client, who has proceeded in an honest, procedurally correct manner throughout, is seen by the court to deserve to be punished *sua sponte* for some so-called 'procedural mess.' It just does not compute. Where is the procedural mess? Since when is it hard for a court to comprehend or handle a couple of motions and a cross-motion involving just one plaintiff and a few defendants? Again, where is the procedural mess? And, anyway, if there is one, who other than the defendants and the court itself created it? My client certainly did not. My client did not default. My client did not ask Magistrate Judge Lebedoff to unjustifiably cancel a hearing of my client's motion to strike the filing of the defendants' Answer without any critical response from Judge Doty. My client did not request the cancellation of the hearing before Judge Doty which was attributed to the reassignment of this case to a

judge who has not even been sworn yet. My client's TRO hearing was cancelled by Judge Doty without extending the courtesy of a notification of the cancellation to my co-counsel until he[3] appeared for the hearing. And it is my client who has not been able to obtain a hearing of its motion for contempt for more than two months and most likely will not obtain one for another two months, if ever.

Motions properly before the court deserve to be ruled on and not obliquely disposed of by *sua sponte* actions which turn a case on its head for the benefit of defaulted defendants by ordering the case to completely start over. Default is being obliquely relieved here, the defendants' rights under Rule 12 are being obliquely reinstated here, and in the process the court has relieved itself of the need to make any required findings concerning the factors justifying relief from default. . . . Moreover, one of the four factors referred to in Accu-Weather as well as in many other cases is the effectiveness of alternative sanctions. However, those sanctions are meant to be alternatives to denying relief from default. In the instant case, however, the court in effect has relieved the defendants from default **and** sanctioned the **non-defaulting** party, while failing to rule from the bench on my client's clear entitlement to alternative sanctions in the form of costs and attorney's fees.

My client deserves an award of costs and attorney's fees for having to resist the defendants' motion for relief from default and for having to move to strike the unauthorized filing of the defendants' Answer. As Your Honor knows, my client has asked for $1,700 for having

3 (and he alone)

to oppose the defendants' motion for relief from default and for $1,300 for having to move to strike the filing of the defendants' void Answer. My client is clearly entitled to such costs and attorney's fees where such an award for resisting a motion for relief from default is not in any way contingent on a denial of such relief and where the defendants could not and did not provide the court with any legal support for failing to move for leave to file their Answer after entry of default, where the defendants did not voluntarily withdraw their Answer despite having ample opportunity to do so, and where Your Honor granted my client's motion to strike the wholly unauthorized filing of that void Answer. At minimum, my client deserves rulings on its properly brought motions for such sanctions.

.
.
.

In other words, defaulting for any or no reason and doing other inarguably unauthorized acts should not be cost-free, but Your Honor appears to believe otherwise by in effect ruling that defaulting can be (or should be) cost-free **and** costly to the non-defaulting party who obtains a default entry, moves for a default judgment, and resists relief from default. Widespread adoption of that approach would do nothing less than undercut the purposes of the court's default rules and chill any inclinations to seek the enforcement of them. Default with impunity and then be rewarded to boot, that's the ticket. Rule 12 prescriptions and proscriptions? They're toothless. Request leave of court to file a responsive pleading after default has been entered? That's an unnecessary bother. On the other hand, oppose relief from default and be penalized and prejudiced *sua sponte*. As I said, it just does not compute, and, accordingly, I cannot believe Your Honor's indicated ruling

will withstand Your Honor's own reexamination or an appeal where Your Honor's findings and rulings would not be protected by the clearly erroneous doctrine. I respectfully request an internally-conducted reexamination of this matter in the light of what I have said, and, inasmuch as my client was denied a hearing on the properness of the Amended Complaint, I respectfully request a court-scheduled re-hearing prior to the issuance of any written order.

Sincerely,

XVI.

On December 4, 1995, Magistrate Judge Mason issued his Report which recommended that Defendants' motion to set aside entry of default be granted; that Plaintiff's cross motions for entry of default judgment be denied; that Plaintiff's motion to strike the Defendants' Answer be **denied**; that Plaintiff's Amended Complaint be dismissed without prejudice for failure to comply with Fed. R. Civ. P. 8 and 9(b); that Plaintiff be given leave to serve a Second Amended Complaint within 30 days; that Defendants be ordered to respond to the Second Amended Complaint pursuant to the Rules of Civil Procedure; and that **all other motions of the parties be denied**. (App. at 10-17, emphasis added).

XVII.

By recommending the denial of Plaintiff's motion to strike Defendants' Answer, however, Magistrate Judge Mason avoided reaching the issue of Defendants' waiver of affirmative defenses and their right to object to Plaintiff's Amended Complaint by way of Rule 12 motions or otherwise. Although argued extensively by Plaintiff in its memorandum and in its reply to Defendants' memorandum in opposition to Plaintiff's motion to strike the filing of

Defendants' Answer and for sanctions (and not at all by Defendants in their memorandum in opposition), those issues are not addressed in the Report. In its Memorandum in Opposition to Motion for Relief from Default. Plaintiff argued in pertinent part as follows:

> In Bavouset v.Shaw's of San Francisco, 45 F.R.D. 296, 298 (S.D. Tex. 1967), the trial court considered whether the defendant, in allowing the case to proceed to default waived its right to assert a Rule 12(b) defense by motion where, as in the instant case, a default judgment had not yet been entered. The Bavouset court found only one case which had not found a waiver under those circumstances, and the logic of that case--Berlanti Construction Co., Inc. v. Republic of Cuba, 190 F.Supp. 126 (S.D.N.Y. 1960)--was not found to be persuasive. Instead, the Bavouset court was persuaded by such cases as Zwerling v. New York & Cuba Mail S. S. Co., 23 F.Supp. 721 (E. D. N. Y. 1940); Heiss v. Nielson, 132 F.Supp. 541 (D.Neb. 1955) (*dicta*); Wabash Ry. Co. v. Bridal, 94 F.2d 117 (8th Cir. 1938); Senitha v. Robertson, 45 F.2d 51 (4th Cir. 1930); Ballard v. United Distillers Co., Inc., 28 F.Supp. 633 (W.D.Ky. 1939); and Commercial Casualty Co. v. Consolidated Stone Co., 278 U.S. 177 (1929). Zwerling, for example, was correctly seen to hold that a defendant in default (but who is allowed to answer on the merits by the court) waives all defenses or objections to the complaint, including the right to assert any Rule 12(b) defenses which are capable of being waived. *Id.* at 298, *citing* 23 F.Supp. at 721. Additionally, and while acknowledging that the case was decided before the adoption of the Federal Rules of Civil Procedure, the Bavouset court was persuaded by the language and logic of the United States Supreme Court in Commercial Casualty, where, concerning the right of a party

in default to object to venue, The Supreme Court said in pertinent part:

> We are of opinion that the privilege is of such a nature that it must be asserted at latest before the expiration of the period allotted for entering a general appearance and challenging the merits. In ordinary course, when that period expires the defendant either will have appeared generally for the purposes of contesting the merits or by suffering a default will have assented that his adversary's allegations be taken as confessed for the purposes of judgment. In either event the suit will have reached the stage where attention must be given to the merits. . . . To hold that such a privilege may be retained until after the suit has reached the stage for dealing with the merits and then be asserted would be in our opinion subversive of orderly procedure and make for harmful delay and confusion. 278 U.S. at 179-180.

XVIII.

The Report's "Discussion" section **did not even acknowledge** that Plaintiff's motion to strike the filing of Defendants' Answer was before the court on December 1st. Magistrate Judge Mason does not seem to have cared that Plaintiff's argument concerning the effect of filing an Answer after entry of default without first obtaining leave of court to do so was not refuted and could not be refuted by Defendants. In Plaintiff's Reply to Defendants' Opposition to Motion to Strike Filing of Answer and for Sanctions, Plaintiff argued in pertinent part (but with no apparent effect) as follows:

In Jones v. Moers, 266 P. 821, 822-823 (1st Dist. Ct. App. 1928), California rules in 1928 required the defendant to answer within 10 days after service of the Summons. *Id.* at 822. The defendant in Jones served and filed his Answer **one day** after default was entered. *Id.* at 821 (emphasis added). The trial court denied the defendant's subsequent motion to set aside the default and was upheld on appeal. *Id.* at 821 and 823. On appeal, the defendant relied on Lunnun v. Morris, 95 P. 907 (Cal. App. 1908)--for the same reason Defendants herein mistakenly rely on Wendt (and only on Wendt)--but the appellate court found Lunnun to be inapposite, saying in pertinent part:

> In the Lunnun v. Morris Case the default of the defendant **had not been entered at the time the answer was filed.** The date allowed by law for answering had expired, **but the answer was not filed before default was entered**. . . . Where a party pleads **before** default entered, though out of time or without leave, if the plea is good in form and substance, the default cannot be entered while the plea stands. 90 F.2d at 823 (emphasis added).

In Taylor v. City of Baldwin, Missouri, 859 F.2d 1330, 1333 n. 7 (8th Cir. 1988), the Eighth Circuit Court of Appeals approvingly quoted Caribbean Produce Exchange v. Cariba Hydro-Trailer, Inc., 65 F.R.D. 46, 48 (D.P.R. 1974), as follows: "**it is the law that once a default is entered, a defendant on default has no further standing to contest the factual allegations of plaintiff's claim for relief**" and, in fact, "**(d)efendant is deemed to have admitted all**

well-pleaded allegations in the complaint." (Emphasis added).

Each of the defendants are in undisputed default. If they wanted to answer after default was duly entered on October 2, 1995, their only recourse was to apply to the court for leave to file an Answer. They did not do that, **and they still have not done that.** Instead, they simply filed their Answer in disregard of the well-settled rule of practice requiring them to ask this court for leave to file it. *See, e.g.*, Gray v. John Jovino Co., 84 F.R.D. 46, 47 (D.C. Tenn. 1979), where, upon being presented with a **stipulated** proposed order setting aside the defendant's default, the trial court said in pertinent part:

> (T)he Court is not aware of any authority it has to set-aside a default merely by agreement of the parties. Even where a default has not been formally entered by the clerk, a defaulting defendant is required to apply to the court for relief on a showing of good cause **before it is permitted to file an answer**. 6 Moore's Federal Practice (2d ed.) 55-231, ¶ 55.10(1); 10 Wright & Miller, Federal Practice and Procedure: Civil 297-298, § 2692. (Emphasis added).

XIX.

On December 21, 1995, Plaintiff objected with respect to all of the Report's recommendations pursuant to Fed. R. Civ. P. 72(b) and 28 U.S.C. § 36(b)(1)(C).

XX.

As support for Magistrate Judge Mason's contention that "(t)here is little doubt that the Court has such power" (to dismiss a complaint *sua sponte*), Magistrate Judge Mason cited two irrelevant, distinguishable cases wherein the complaints were written by *pro se* prison inmates [Salahuddin v. Cuomo, 861 F.2d 40 (2d Cir. 1988), and

Simmons v. Abruzzo, 49 F.3d 83 (2d Cir. 1995)]. The Report notes that dismissals of complaints should be done sparingly, yet Magistrate Judge Mason has now recommended two such dismissals within the space of only three months (in the instant case and in In Re Buffets, Inc. Securities Litigation (D. Minn. Civil No. 3-94-1447). That may just be coincidence, or it may not. On the other hand, there may have been still others of which Plaintiff is unaware, but, even if not, the application of the power to dismiss a complaint is hardly being done sparingly when it is done twice in the space of three months. In In Re Buffets, at least the defendants brought a motion to dismiss the plaintiff's Complaint. In Salahuddin, the complaint was referred to the magistrate for a recommendation as to whether the defendants should be required to answer it. 861 F.2d at 41. It was inaccurate for the appellate court to say that the trial court dismissed the complaint *sua sponte*. In Simmons, the prisoner's complaint was in narrative form. 49 F.3d at 85. Unlike the defaulted Defendants herein, neither the defendants in Salahuddin nor the defendants in Simmons had defaulted when the respective complaints were dismissed. The extreme action of dismissal--whether with or without prejudice (Plaintiff sees little difference)--did not restore waived rights of the defendants in Sallahuddin and Simmons as it would do in the instant case. Sallahuddin and Simmons are inapposite to the instant case. Magistrate Judge Mason said that "(t)he Court will not attempt to articulate every deficiency in the Amended Complaint" and certainly did not, but the Report did impliedly criticize the Amended Complaint's length, its number of paragraphs, its number of causes of action, the legal theory presented, its lack of specificity of its allegations, and the unintelligibility of Counts III and IV. The number of pages, the number of paragraphs, and the number of causes of action are, of course, meaningless. The asserted unintelligibility of two of fourteen counts hardly stands as a reasonable ground for a dismissal of the entire Amended Complaint. Throwing out the baby with the bathwater comes to mind. On the question of the asserted lack of specificity of the allegations in the

Amended Complaint, the Amended Complaint must speaks for itself. Plaintiff cannot disprove a negative. Its allegations are as specific as anyone could want. To order Plaintiff to re-write the Amended Complaint without even specifying what is not specific enough amounts to sending Plaintiff out on a snipe hunt. Broadly speaking, the Amended Complaint is criticized from two incongruous and mutually-exclusive angles. It is said to be prolix while at the same time lacking in specificity. Only Magistrate Judge Mason and now Judge Tunheim think so. Defendants never raised those issues by way of a motion for a more definite statement, either because they did not think so or maybe because they simply forgot. The Report mentioned that there have been about 60 docket entries in the short history of this case and numerous motions and court appearances. The number of docket entries is meaningless, of course, and there have not been numerous motions and court appearances--unless one defines "numerous" to be "one." The submission of motion papers results in five or more docket entries by itself. One for the notice of motion, one for the memorandum, one for each affidavit, *etc.* As for the "numerous" motions and court appearances that supposedly occurred prior to the hearing before Magistrate Judge Mason on December 1st., there was only one court appearance and only one motion prior to that hearing (Plaintiff's TRO/preliminary injunction motion which accounted for the one court appearance).

XXI.

Respondent Tunheim adopted all of Magistrate Judge Mason's recommendations in his Order dated February 20, 1996, without addressing the inconsistency between Magistrate Judge Mason's bench ruling and his written recommendation as to whether Defendants' Answer should be stricken. (App. at 4-8).

XXII.

Petitioner questions whether a court exceeds its jurisdiction or grossly abuses its discretion when it completely disregards (1) the law applicable to the filing of an Answer **by a party against whom default has already been duly entered** and (2) the legally imposed, jurisdictional finalities imposed by Fed. R. Civ. P. 12 on a party who fails to plead or otherwise defend within the time allowed. Both Magistrate Judge Mason and Judge Tunheim exhibit the erroneous belief that a duly entered default has no legal effect on the defaulting party's right to file an Answer after default has been entered, that a duly entered default does not require a defaulted party to obtain leave of court **before** filing an Answer, and that waived Fed. R. Civ. P. 12 rights can be resuscitated by judicial *fiat*. Each of the defendants are in undisputed default. If they wanted to answer after default was duly entered on October 2, 1995, their only recourse was to apply to the court for leave to file an Answer. They did not do that, **and they still have not done that**. Instead, they simply filed their Answer in disregard of the well-settled rule of practice requiring them to ask this court for leave to file it. Filing of an Answer by a party in default is a nullity. Defendants' Answer is void, and its filing must be stricken as a matter of law.

XXIII.

Petitioner questions whether a court exceeds its jurisdiction or grossly abuses its discretion when completely ignores the objective bright line jurisdictional requirements of Fed. R. Civ. P. 12 while dismissing a party's **entire** complaint on the grounds that it violates the subjective requirements of Fed. R. Civ. P. 8 and 9(b). In other words, Petitioner questions whether a court exceeds its jurisdiction or grossly abuses its discretion when, in a self-described attempt "to bring some life back into Rule 8," that court suffocates Rule 12. The considerable, understandable details of Plaintiff's Amended Complaint

would be found to be clear, intelligible, and sufficient by **any** reader not otherwise predisposed to find a reason--any reason--to inexplicably visit undeserved punishment on Plaintiff in order to give Defendants a second chance to comply with the jurisdictional prescriptions and proscriptions of Fed. R. Civ. P. 12.

XXIV.

Petitioner questions whether a court exceeds its jurisdiction or grossly abuses its discretion when it sets aside the default of a party who willfully defaulted and who has no meritorious defenses. "Opposing" Plaintiff's motion for a TRO and "negotiating" a stipulation are said by Judge Tunheim to show that Defendants "were not engaged in willful violations of court rules or intentional delays." (App. at 6, citing Docket Nos. 14 and 20). That would be fine if Defendants actually opposed the TRO or negotiated a stipulation, but Defendants did neither. Docket Entry Nos. 14 and 20 are not evidence of such opposition or negotiation. Docket Entry No. 14 is the transcript of the TRO/Preliminary Injunction hearing, a hearing which was held **after** Defendants' deadline to plead or otherwise defend had passed. Docket Entry No. 20 is the Stipulation which was not the product of any negotiation but instead was written by attorney O'Kane and offered to Defendants on a take-it-or-leave it basis. In sum, Defendants demonstrated no credible excuse for their so-called "inadvertence," and simple "inadvertence" does not by itself excuse a default. Although asked to do so, Magistrate Judge Mason and Judge Tunheim do not appear to have considered Canup v. Mississippi Valley Barge Line Company, 31 F.R.D. 282 (W.D. Pa. 1962), where the trial court was confronted with a set of facts which were remarkably (if not eerily) similar to the facts of the instant case. The Complaint therein was personally served on August 8th (1962). *Id.* The defendant had 20 days to answer but did not answer by August 28th. *Id.* The plaintiff caused default to be entered on August 29th and moved for a default judgment. *Id.* On September 6th, the

defendant filed a motion to open the default and to file its answer out of time (which Defendants herein never bothered to do). The trial court denied the defendant's motion to open the default and granted the plaintiff's motion for a default judgment, saying in pertinent part:

> The motion shows that defendant's counsel had knowledge of the case as early as August 16[4], but permitted the date for filing answer to pass without seeking any extension. Counsel was aware of a possible defense of release, and gives no excuse for delay except 'inadvertence.'
>
> One of the basic purposes of the Rules of Federal Procedure is to secure the 'speedy' determination of pending litigation. Since Magna Carta (cap. 40; see McKechnie, Magna Carta, 2d ed., p. 395) delay has been recognized as *pro tanto* denial of justice. In Shakespeare's Hamlet 'the law's delay' is condemned. The evil is an old one. It has merely become more widespread as the number of pending cases has increased in our urban civilization.
>
> Calendar control by the Courts and the setting of fixed dates for the various steps to be taken in the course of litigation are among the means by which it is sought to eliminate delay.
>
> The bar must realize, and we declare it as emphatically as we can, that **these dates fixed by law, rule, or court order mean something. They are not empty formalities. To neglect and ignore a date for action in a court proceeding is in reality a thinly-veiled species of disrespect or contempt for the Court.**

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4 In other words, 12 days before its Answer was due, compared to 13 days in the instant case (counting from service of the Amended Complaint).

The proper procedure when additional time for any purpose is needed is to present to the Court a timely request for extension of time (*i.e.*, a request presented before the time then fixed for the purpose in question has expired).

In view of the practicalities of life, opposing counsel are ordinarily only too liberal in agreeing to such requests by their brethren at the bar. The Court (at least this member of the Court) is perhaps equally indulgent in granting such unopposed requests (although we realize they may often be consented to out of log-rolling reasons, rather than a strict regard for a client's welfare).

With similar regard to the practical realities of life, the Court (at least this member of the Court) is ordinarily indulgent when counsel's disability is due to conflicting professional engagements or even to impelling personal reasons (such as vacation or hunting season, family events of joyful nature such as weddings or christenings, public or philanthropic service, bar association activities, and the like, as well as the more sombre occasions of illness or death).

Such indulgence is the more readily accorded when the barrister seeking it is one whose record of past dealings with the Court has been marked by fairness and diligence in cooperating with the Court's objective of promptly disposing of pending litigation[5].

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5 In Canup, the defendant's attorney's law firm had a record of failures to meet appellate filing deadlines, but the judge himself was not personally familiar with the defendant's lawyer. 31 F.R.D. at 284. In the instant case, this court is personally familiar with the propensity of Defendants' attorney Smith to prevaricate. *See* letter of September 29, 1995, from Plaintiff's attorney Stanbury to

. . .

> In view of all the circumstances, we find no good reason to justify defendant's delay in the case at bar. We shall deny the motion to open, and shall also sign the plaintiff's undisposed of motion for judgment under Rule 55.

Id. at 283. (Emphasis added).

XXV.

Petitioner questions whether a court exceeds its jurisdiction or grossly abuses its discretion when it finds defenses to be "meritorious" where it is already clear that those defenses are based on perjured, implausible testimony. Defendants have not demonstrated a meritorious case regardless of the analytical approach employed. A majority of the courts that have considered the meritorious defense question are said to have refused to accept general denials or conclusory statements that a defense exists, insisting on a presentation of some factual basis for the supposedly meritorious defense, *see generally* Federal Deposit Ins. Co. v. Barnes, 383 F.Supp. 1134 (D.C. Pa. 1980) , and, in that regard, Defendants herein have presented absolutely **no** factual basis for their supposedly meritorious defense. In Federal Trade Commission v. Packers Brand Meats, 562 F.2d 9, 10 n. 3 (8th Cir. 1977), where the respondent's defense was not found to be meritorious, the trial court had said in pertinent part:

> Finally, although a default judgment is a harsh remedy, respondents have failed to make any showing that they have a defense on the merits to the petition for enforcement of the subpoena. The **bald allegation** that a good defense exists, without the support of factual contentions or legal authorities, is insufficient. The apparent

Judge Doty in App. at 1.

> harshness of the default judgment may therefore have no substance since a defense on the merits may not exist. (Citations omitted; emphasis added).

Based on affidavit testimony of Defendant Schoonover and written assertions by Defendants' attorney Smith, Defendants' "meritorious defense" consists of the following, **and nothing more**: "Defendant Schoonover told Joan Larson that he had a potential contact to one of the associate producers of the Oprah Winfrey show, that he would contact that person to see if there was any interest in having Joan Larson appear on that show, **and that he did not tell that to Joan Larson until after the "Rep Agreement" was executed in November 1994**." That's it. That is Defendants' "meritorious defense," and it is based on the perjured testimony of Defendant Schoonover to boot. Nothing of substance is said in response to Plaintiff's case for breach of contract, breach of promise, loss of sales and profits, and conversion. **Everything else** asserted by Defendants is either conclusory or meaningless hearsay. It is absolutely implausible that Plaintiff was induced to sign away half of its future sales to Defendants because Defendants said that "**they**" would "**try**" to book Joan Larson on "**a** television show" in the future or, alternatively, because Defendant Schoonover alone made that statement "**after**" the Rep Agreement was signed. Believing Defendants requires one to believe that Plaintiff walked away from an imminent $250,000 equity capital infusion by an investor named Barbieri in favor of linking up with two strangers who promised nothing and would have one believe that they said nothing more than they were two former stockbrokers who had a native talent for marketing and promotion. Months before she met Defendant McManus, Joan Larson had been booked to do the Susan Powter Show and proceeded to tape the first of two such shows before she even met Defendant Schoonover for the first time and before the Rep Agreement was signed. Defendants do not have a

meritorious defense to their individual liability. Their conduct as individuals fraudulently induced Plaintiff to enter into the Rep Agreement and occurred **before** the defendant corporation called The JB Group, Inc., was incorporated. Moreover, under the circumstances, the legal fiction of a corporation will not shield the conduct of Defendants McManus and Schoonover as officers of that legal fiction. Nevertheless, in the face of all of that, Judge Tunheim is able to say that "The defendants' defenses will be meritorious if proven." (App. at 6).

XXVI.

Petitioner questions whether a court exceeds its jurisdiction or grossly abuses its discretion when it declines to sanction a defaulted party for requiring the non-defaulting party to resist a motion to set aside the default and for requiring a non-defaulting party to move to strike the unauthorized filing of a void Answer on the speciously irrelevant grounds that the non-defaulting party could have avoided incurring costs and attorney's fees by not trying to obtain a default judgment. *See* App. at 7 ("The plaintiff could have assessed the chances of success in obtaining a default judgment and chosen to avoid incurring these costs"). In other words: "Doc, it hurts when I do this." "Well, then don't do that!". Magistrate Judge Mason gave no consideration at all to the effectiveness of alternative sanctions and instead recommended a cost-free relief from default which has been adopted by Judge Tunheim. Support for the imposition of such sanctions under the circumstances is well-settled. In a case cited by Defendants and said to have been read by Magistrate Judge Mason, International Brotherhood of Electrical Workers, Local Union No. 313 v. Skaggs, 130 F.R.D. 526 (D. Del. 1990), the court granted the defendant's motion for relief from default **and** granted an award of costs and attorney's fees to the plaintiff for obtaining the default and resisting the motion to set it aside, saying in pertinent part:

> Despite the wide discretion given the District

> Court and the stated preference for a resolution on the merits, the Third Circuit requires District Courts to consider several factors in the determination of a motion to set aside a default or a default judgment. Those factors are: (1) whether the plaintiff will be prejudiced by setting aside the default; (2) whether the defendant has a meritorious defense; (3) whether the default was the result of the defendant's culpable conduct; and (4) **the effectiveness of alternative sanctions**. (Citation omitted).
>
> .
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>
> To avoid the harshness of a default, courts favor alternative sanctions which would be equally effective yet less severe. (Citation omitted). In the present case, Counterclaim Plaintiff argues that if the default is set aside, Counterclaim Defendant should bear the reasonable attorney's fees associated with obtaining the default and resisting the motion to set aside the default. **The Court agrees that the facts presented in the present situation justify the alternative sanction**. 130 F.R.D. at 528-530. (Emphasis added).

XXVII.

Petitioner questions whether a court exceeds its jurisdiction or grossly abuses its discretion when it fails to impose the least severe sanction necessary to accomplish what the court believes should be done. Where a court concedes an inability (or unwillingness) to cite anything more than a few vaguely-described aspects of a Complaint as violative of Fed. R. Civ. P. 9(b) and 8, Plaintiff submits that ordering anything more than isolated, specifically described alterations of the complaint cannot be justified. By any standard **and where the other party has defaulted and never moved for a more definite statement**,

requiring a non-defaulting party, ***sua sponte***, to re-write, re-serve, and re-file its **entire** complaint under threat of outright dismissal is quintessentially capricious. It is outrageously severe. Defendants never moved for a more definite statement concerning the Amended Complaint because they never pleaded or otherwise defended at all during the time allowed. The dismissal of the Amended Complaint has been recommended *sua sponte*, and Magistrate Judge Mason obviously knew he was going to do that before the hearing began on December 1st. Nevertheless, no argument on that issue was elicited from Plaintiff's attorney Stanbury during the hearing. The court's unjustifiably extreme decision in that regard was just "dropped" on Plaintiff at the conclusion of the hearing and accounts for an estimated two-thirds of the discussion appearing in the Report adopted with commendation by Judge Tunheim. (App. at 6). Dismissing the Amended Complaint **in the context of the default by Defendants** stands Rule 12 on its head. The timelines and waivers of Rule 12 are being sacrificed on the altar of Rules 8 and 9(b). There are other, less extreme ways to clarify pleadings and to narrow issues during the course of litigation without dismissing a complaint and giving the defaulted Defendants an undeserved second chance to avail themselves of the Rule 12 objections, *etc*. If anything, the "current procedural posture" of this case which Judge Tunheim proposes to correct by dismissing the Amended Complaint is a product of the actions and inactions of Defendants and the court itself. Placing the obligation to correct that so-called "current procedural posture" or "procedural mess" on the back of Plaintiff in order to completely absolve the defaulted Defendants makes no sense.

XXVIII.

Relief in the nature of prohibition may be granted when a court has acted in excess of its jurisdiction or has committed a gross abuse of discretion in exercising its functions in circumstances where appeal is not an

appropriate or adequate remedy.

WHEREFORE, Petitioner prays:

1. That this Court accept this petition, to issue its rule to show cause to the respondent court, and, upon completion of the briefing, to make the rule to show cause absolute and to direct the respondent court to vacate and expunge from the record the Order of February 20, 1996, and proceed in the proper confines of its jurisdiction and discretion by ordering that Defendants' Answer shall be stricken as void and unauthorized; that Defendants have waived their right to object and assert affirmative defenses to Petitioner's Second Amended Complaint; that Defendants' default shall not be set aside; that Plaintiff's motion for entry of a default judgment and for a trial on the issue of damages shall be granted; and that Petitioner shall be awarded its costs and reasonable attorney's fees for having to move to strike Defendants' unauthorized filing of a void Answer and for having to resist Defendants' motion for relief from default.

2. That petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

April 5, 1996.

ALFRED STANBURY
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STANBURY LAW FIRM P.A.
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APPENDIX INDEX

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September 29, 1995

Judge David Doty
United States District Court
670 U. S. Courthouse
110 South Fourth Street
Minneapolis, MN 55401

Re: Bio-Recovery, Inc., v. The JB Group, Inc., *et al.*
U. S. District Court Civil Action No. 4-95-Civil-554
HAND-DELIVERED

Dear Judge Doty:

The defendants' counsel did exactly what I predicted he would do when I addressed Your Honor this morning at the TRO hearing in the above-referenced case. This letter will not be joined up with a transcript or partial transcript of the hearing until this letter is delivered to Your Honor, so I can only speak about what was said based on my recollection, but my recollection has been reinforced by having had the court reporter read certain portions of what was said from his tape.

Specifically, Your Honor heard me say that my client would accept the previously agreed to language of the stipulation, without any alteration whatsoever, but only if the release of the 800 number were incorporated into the stipulation. I predicted to Your Honor that, if the attorneys were to be sent off to negotiate, it would simply turn out to be an opportunity for Mr. Smith to haggle and do something which would succeed in putting this matter off. Your Honor turned to Mr. Smith and asked him directly whether he had any problem with any term of the stipulation--with any little term--and he said "No." He did not say "Maybe" or "One" or "A few." He said "No." He told me yesterday afternoon that his clients were going to release the 800 number without any *quid pro quo* or conditions. He told that to Your Honor's clerk yesterday

afternoon. I know that because, when Your Honor's clerk spoke to me after having been told that, she could not seem to understand why we did not feel we had obtained everything we wanted.

Shortly thereafter, the hearing ended, and 26 steps down the hall later, when we attorneys sat down in the attorneys' room, the first words out of Mr. Smith's mouth amounted to a refusal to release the 800 number unless my client agreed to wipe out the stipulation's requirement that the funds which would be sent to the defendants after certain inventory were shipped to Minneapolis would have to be escrowed. More specifically, I asked Mr. Smith, "Will you agree to all of the stipulation's terms as already agreed-to plus a release of the 800 number?" His answer: "Maybe." Yesterday, he wanted to tie that exclusion to a release of the 800 number, and I told him my client would not agree to it. Later in the day, he left a message on my machine saying they were simply going to release the 800 number, and, as I said, that is what Mr. Smith told Your Honor's clerk when he also said that he was not going to appear today or submit any responsive papers. He did appear, of course, but no responsive papers were submitted despite the fact that Your Honor's clerk must have told him, just as she told me, to brief the issue--which I did.

For a while, Mr. O'Kane and I entertained agreeing to abandon the escrow requirement but asked for a faxed list of the inventory, which Mr. Smith says is about $30,000. Such a list was requested by Mr. Smith and received by a bookkeeper at my clients' office. She cannot make much sense of it but is pretty sure that it is not accurate. For example, the number of books said to be in inventory is said to be 5,120 but should be 6,895. That discrepancy alone amounts to about $26,000 where the books are sold for $14.95, and that alone is enough for us to refuse to devote any more consideration to abandoning the escrow requirement.

I respectfully refer Your Honor to all that was said in my client's Supplemental Memorandum concerning the

importance of the 800 number. The defendants are out of business. They do not need that number. What we have here is bordering on extortion. Your Honor may believe that it seems like the defendants do this and do that and then the plaintiff says "Yeah, but . . . ," but the facts and now the record, too, show that it is the other way around.

Consequently, I respectfully ask that the court proceed to calendar this matter for a hearing on my client's preliminary injunction motion and direct the defendants to once and for all submit responsive papers.

Sincerely,

STANBURY LAW FIRM

/s/

Alfred Stanbury
Attorney for Plaintiff Bio-Recovery, Inc.

Enclosure: Hearing transcript

cc: Brian O'Kane, Esq.
Ralph and Joan Larson
Marc Smith, Esq. (by fax)
Stephen Warch, Esq. (by fax)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

BIO-RECOVERY, INC.,

Plaintiff

v.

THE JB GROUP, INC., and JAMES SCHOONOVER and BRIAN MCMANUS, Individually and as Officers of The JB Group,Inc.,

Defendants.

Civil No. 4-95-554

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Plaintiff, the Bio-Recovery, Inc. distributes a book entitled "Seven Weeks to Sobriety" and certain dietary supplements recommended therein. Bio-Recovery executed a contract with the defendant, the JB Group, Inc., negotiated by its officers, defendants James Schoonover and Brian McManus. This contract required the JB Group to promote plaintiff's products. Bio-Recovery filed breach of contract and fraud claims against defendants arising from their negotiations and contract.

The matter is before the Court on the plaintiff's Objection[1] to the December 4, 1995 Report and

[1] The parties dispute whether the plaintiff filed this Objection within the 10-day period specified by LR72.1(c)(2). The issue turns on whether an objecting party may add three days for service by mail, pursuant to Fed. R. Civ. P. 6(a). Because the defendants are before the Court requesting relief from their failure to file a timely Answer, the Court will not allow them to benefit from a restrictive interpretation of

Recommendation of the Magistrate Judge, which set aside the entry of default, denied the entry of default judgment, denied the plaintiff's motion to strike the Answer of the defendants, dismissed the plaintiff's Amended Complaint with leave for the filing of a Second Amended Complaint, and denied other motions for alternative relief and sanctions. [Docket No. 61.].

In the particular procedural posture of this case, the motions before the Court have the same effect as motions for review of default judgments and motions to involuntarily dismiss actions. For that reason, the Court agrees with the Magistrate Judge that they should be treated as dispositive motions. LR72(c)(1). When a party objects to portions of a magistrate judge's report and recommendation on dispositive motions, this Court makes a de novo determination of those portions subject to objections. LR72.1(c)(2).

The Court may consider the record developed before the Magistrate Judge or receive further evidence. Id. The plaintiff has requested that this matter be set for oral argument; however, the Court declines to do so because the record developed before the Magistrate Judge is sufficient.

The principal issue is whether the Court should set aside the default, as requested by the defendants, or enter judgment on the default, as moved by the plaintiff. The Court may set aside default for good cause shown. Fed. R. Civ. P. 55(c). Default judgments are not favored by the law. United States on Behalf of Time Equip. Rental v. Harre, 983 F.2d 128, 130 (8th Cir. 1993). Marginal failure to comply with the time requirements should be distinguished from willful violations of court rules or intentional delays. The parties agree that the Court may consider factors such as whether the failure to file a timely answer was willful, whether the defendant has meritorious defenses, whether the plaintiff is prejudiced, and the nature

LR72.1(c)(2).

of the reason for failure to respond in a timely fashion.

Considering all of these factors, it is appropriate to set aside the default and deny the motion to grant default judgment on the default. Defendants in this matter initially engaged in their defense by opposing the motion for a temporary restraining order and negotiating a stipulation regarding the motion for a preliminary injunction. [Docket Nos. 14,20]. These facts tend to show that defendants were not engaged in willful violations of court rules or intentional delays. Rather, they simply overlooked the deadline for filing an Answer. When they discovered their omission, they acted quickly to produce the Answer that they would file if allowed. This Answer shows defenses that would be meritorious if proved. There has been no showing of prejudice to the plaintiff resulting from an extension of the time available for the defendants to file an Answer.

The Court also agrees with the Magistrate Judge that the Amended Complaint fails to comply with Rules 8 and 9(b) of the Federal Rules of Civil Procedure. The plaintiff is granted leave to file a Second Amended Complaint. Such a pleading should provide "a short and plain statement" of each claim, so as to show why plaintiff believes it is entitled to relief. Fed. R. Civ. P. 8. Every claim of breach of contract should identify what contract is alleged to have been breached. Every claim of fraud should state with sufficient particularity the circumstances alleged to constitute fraud. Fed. R. Civ. P. 9(b). The Amended Complaint now on file does not meet these standards. The Court commends the Magistrate Judge for raising this issue sua sponte, as this case is likely to proceed in a more orderly and efficient manner if the pleadings comply with Rules 8 and 9(b).

The plaintiff's motion to strike the Answer is moot, since the defendants will need to file an Answer that responds to the Second Amended Complaint. After that Answer is filed, the plaintiff can raise the issue of whether

defendants, by failing to file a timely Answer, waived any affirmative defenses.

The Court also denies the plaintiff's request for the costs of litigating the default. The plaintiff could have assessed its chances of success in obtaining a default judgment and chosen to avoid incurring these costs. To award costs would encourage litigants to pursue default judgments in situations where courts are unlikely to grant them.

ORDER

Based on the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, the Court **OVERRULES** the Objection of the plaintiff [Docket No. 65] and **ADOPTS** the Report and Recommendation of the Magistrate Judge. **IT IS HEREBY ORDERED** that:

1. The defendants' motion to set aside entry of default is granted;

2. The plaintiff's "cross motions" for entry of judgment be denied'

3. The plaintiff's motion to strike the Answer of defendants be denied;

4. The plaintiff's Amended Complaint be dismissed without prejudice for failure to comply with Rules 8 and 9(b) of the Federal Rules of Civil Procedure;

5. The plaintiff be given leave to serve a Second Amended Complaint upon the defendants by service upon counsel for the defendants within 30 days;

6. The defendants are ordered to respond to the Second Amended Complaint after such service, pursuant to

the Rules of Civil Procedure; and

7. All other motions of the parties for alternative relief or sanctions are denied.

February 20, 1996.

/s/
JOHN R. TUNHEIM
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1515MNMI

In re:	*	
	*	
Bio-Recovery, Inc.,	*	
	*	Appeal from the United
Petitioner,	*	States District Court for
	*	the District of Minnesota
	*	
	*	

JUDGMENT

After consideration of the court, petitioner's motion for stay of the district court order and petition for writ of prohibition are denied.

March 5, 1996

Order entered at the Direction of the Court

/s/

Clerk, U. S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

BIO-RECOVERY, INC.,

Plaintiff

v.

THE JB GROUP, INC., and JAMES SCHOONOVER and BRIAN MCMANUS, Individually and as Officers of The JB Group, Inc.,

Defendants.

Civil No. 4-95-554

REPORT AND RECOMMENDATION

This matter is before the Court upon various motions by the parties with respect to the procedural status of this case. Alfred Stanbury, Esq. and Brian O'Kane of Stanbury Law Firm appeared on behalf of the Plaintiff; Stephen Warch, Esq. and Eric Magnuson, Esq. of Rider, Bennett, Egan & Arundel appeared on behalf of Defendants.

FINDINGS OF FACT/REPORT

This matter has a complicated procedural history. It serves to instruct as to the manner in which careful adherence to the requirements of the Rules of Civil Procedure serves to achieve economy and clarity in litigated matters - and it also illustrates the confusion which can otherwise result. The Complaint was filed in late August, 1995. In the short history of the case there have been almost 60 docket entries, numerous motions and

court appearances, an Amended Complaint (consisting of 151 paragraphs in 33 pages) and a failure to file a timely Answer to the Complaint or Amended Complaint. The Court has entered a default against the Defendants, who have moved to vacate the default. Plaintiff has moved to strike an Answer filed by Defendants, and has filed what it designates as "Cross-Motions for Entry of Default Judgment and for Order Setting Trial To A Jury Solely On Issue of Damages."

The parties have presented these motions to this Court, and express the view that the determination of their motions are within the power of this Court. This Court concludes, however, that its decision should be in the form of a Report and Recommendation, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B).

PROCEDURAL HISTORY

Defendants do not deny that they failed to file an Answer to the Complaint or to the Amended Complaint within the time specified by the Rules of Civil Procedure, and that they were in default. On October 2, 1995, the Clerk entered a default, upon the application of Plaintiff [Docket No. 15]. Neither party focuses upon the procedural status of the case at that point.

The entry of default by the Clerk of Court was a ministerial act pursuant to Rule 55(a) of the Rules of Civil Procedure. Once the clerk enters default, a party may obtain a default *judgment* only pursuant to the provisions of Rule 55(b)(1), but only if the Complaint is for a sum certain, which is not this case. The entry of a default judgment by the Court is governed by Rule 55(b)(2). Parties may seek relief from entry of default, (and even from entry of default judgment) pursuant to the provisions of Rule 55(c). *See generally* 10 Wright, Miller & Kane, Federal Practice and Procedure §§ 2683, 2685, 2692, 2693, and 2694 (2d Ed. 1983).

DISCUSSION

Simultaneously before the Court are the motions of Plaintiff that default judgment be entered pursuant to Rule 55(b)(2), and Defendants' motion under Rule 55(c) for relief from the Clerk's entry of default. The standards for determining a motion to vacate a default have been frequently stated. The issue is committed to the sound discretion of the trial court, and default judgments are not favored. *E.g.* United States on Behalf of and for the Use of Time Equipment Rental & Sales, Inc. v. Harre, 983 F.2d 128 (8th Cir. 1983). Numerous authorities have considered the issue, but they need not be cited because the parties are agreed that the Court may consider factors such as whether the failure to file a timely answer was willful, whether the defendant has meritorious defenses, whether the Plaintiff is prejudiced, and the nature of the reason for failure to respond in a timely fashion.

In this case, the motion is to vacate the Clerk's entry of default. "Relief from an entry of default will be granted more readily and with a lesser showing than in the case of a default judgment." First Interstate Bank of Oklahoma, N.A. v. Service Stores of America, Inc., 128 F.R.D. 679, 680 (W.D. Okla. 1989).[1] Applying each of the appropriate tests, there is little doubt that the Court should grant Defendant's Motion to Vacate. Defendants sought to Answer the Amended Complaint within a few days of the deadline and they assert what would be meritorious defenses if proved. In similar circumstances, the Court of Appeals for the Eighth Circuit held that a default judgment should be vacated:

> "The entry of a default judgment for a marginal failure to comply with the time

[1] In that case the Court also noted: "The purpose of this Memorandum Opinion is for the Court to express its extreme displeasure with the conduct of Plaintiff's counsel in attempting to 'snap up' a default judgment." First Interstate, 128 F.R.D. at 680.

> requirements--in this case being twelve days late--should be distinguishable from dismissal or other sanctions for willful violation of court rules, contumacious conduct, or intentional delay."

Harre, 983 F.2d at 130. As in that case, there is no willfulness on the part of defendants. They simply forgot to file the Answer during the flurry of other activity in the case. *See* Accu-Weather, Inc. v. Reuters, Ltd., 779 F.Supp. 801, 804 (M.D. Pa. 1991). Plaintiff strenuously urges that there was inadequate activity in the case to justify such a lapse of memory by counsel. Even if that were correct, it would not warrant the sanction of entry of a default judgment against their clients. Plaintiff suffered no prejudice that the Court can discern by reason of the slightly tardy response, and Plaintiff presents no Affidavit to substantiate such a claim.

There is an additional reason why the entry of default should be vacated in this case. The Amended Complaint fails to comply with the provisions of Rule 8 and Rule 9)b) of the Federal Rules of Civil Procedure.

THE AMENDED COMPLAINT

This Court on its own Motion recommends that the District Court dismiss the Amended Complaint without prejudice, to allow Plaintiff to file a Complaint which complies with the requirements of Rules 8 and 9(b) and other applicable Rules of Civil Procedure. The Complaint is prolix in the extreme. The reasons of federal law and policy requiring compliance with these and other pleading rules in the Federal Rules of Civil Procedure was explained in some detail in In re Buffets, Inc., 1995 WL 702915 (D. Minn. 1985), and the cases cited therein. Those reasons are also made apparent by the Amended Complaint in this case.

The Court will not attempt to articulate every

deficiency in the Amended Complaint. It consists of 151 paragraphs stated in 33 pages. It purports to set forth 14 different "Causes of Action." The first 46 paragraphs in the Amended Complaint are perhaps presented by way of "background," and the succeeding paragraphs are intended to attempt to comply with Rule 10 of the Federal Rules of Civil Procedure. Yet as to each of the succeeding counts, the Amended Complaint purports to "repeat, reiterate and reallege" all of the the preceding allegations.

It is not possible to determine from the allegations in any Count in the Amended Complaint just what legal theory is presented, nor what relief is sought as to that count. Counts I and II seem to allege that Plaintiff was fraudulently induced to enter into "the [unspecified] Contract hereinbefore referred to" in one or more of the 46 preceding paragraphs, but the allegations wholly fail to meet the specificity standards of Rule 9(b). Counts III and IV are unintelligible. The remaining counts seem to seek to allege a breach of various unspecified contracts or "understandings" or "representations."

For the reasons set forth, it is recommended that Plaintiff's Amended Complaint be dismissed without prejudice for failure to comply with the provisions of Rule 8 and Rule 9(b), that Plaintiff be given leave to serve a Second Amended Complaint within 30 days of the date of this Order, and that Defendants be required to respond to the Second Amended Complaint after service in accordance with the Rules of Civil Procedure.

The Couirt is recommending dismissal of the Amended Complaint upon its own motion, for failure to comply with the provisions of Rules 8 and 9(b). There is little doubt that the Court has such power. *E.g.*, Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988); Simmons v. Abrouzzo, 49 F.3d 83, 86-87 (2d Cir. 1995). Such power should be used sparingly, particularly if the dismissal is with prejudice. Id. Here, the recommendation is made that the dismissal be without prejudice, to afford

the Plaintiff an opportunity to set forth its claim with the clarity and particularity required by the Rules of Civil Procedure. The Court reaches its recommendation after a thorough consideration of the importance of clear pleadings to the Plaintiff as well as the Defendants. It is clear to this Court that if the current procedural posture of this case is not corrected as proposed, all parties will suffer from unnecessary expense and delay in the preparation of this matter for trial, and in the taking of discovery.

The parties are served by the filing of a new Complaint. Equally important, reasons of judicial efficiency and economy also require the action recommended:

> "By complying with the requirements of Rule 8, it is likely that a Complaint will also comply with Rule 9(b), and it will be more readily apparent as to whether the Complaint complies with Rule 12(b)(6). Where the allegations are clear, the parties themselves may ascertain whether discovery requests are reasonably related to the issues in the litigation, thus reducing the risk of costly disputes about discovery issues. After the close of discovery, clear pleadings enable the parties to focus the issues for presentation of motions for summary judgment or trial. Finally, the wide latitude afforded by notice pleading is balanced by requiring restraining by attorneys in presenting only those allegations that the attorney believes are proper and supported by law and the facts. Requiring clarity in pleading serves to enhance the self-policing features embodied in Rule 11, since it then may more easily be seen whether the requirements of Rule 11 have been met."

In re Buffets, Inc., 1995 WL at 702195.

CONCLUSION

Based on the foregoing, and all files, records and proceedings herein,
IT IS HEREBY RECOMMENDED that:

1. Defendants' Motion to set aside entry of default be granted;

2. Plaintiff's "Cross Motions" for entry of judgment be denied;

3. Plaintiff's Motion to strike the Answer of Defendants be denied;

4. Plaintiff's Amended Complaint be dismissed without prejudice for failure to comply with Rules 8 and 9(b) of the Federal Rules of Civil Procedure;

5. Plaintiff be given leave to serve a Second Amended Complaint upon Defendants by service upon counsel for Defendants within 30 days;

6. Defendants be ordered to respond to the Second Amended Complaint after service, pursuant to the Rules of Civil Procedure; and

7. All other motions of the parties be denied.

December 4, 1996.

/s/
JOHN M. MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with

the Clerk of Court, and by serving upon all parties within ten days after service of a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the basis for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing within ten days after service of the Report and Recommendation.